



# ***CR 2007/83 - Income tax: scrip for scrip: acquisition of Symbion Health Limited by Healthscope Limited***

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## Class Ruling

### Income tax: scrip for scrip: acquisition of Symbion Health Limited by Healthscope Limited

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#### **① This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

#### **Relevant provision(s)**

2. The relevant provisions dealt with in this Ruling are:

- Division 1A of former Part IIIAA of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 177E of the ITAA 1936;
- section 177EA of the ITAA 1936;
- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 109-10 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- Subdivision 124-M of the ITAA 1997;

- section 202-5 of the ITAA 1997; and
- section 204-30 of the ITAA 1997.

All references in this Ruling are to the ITAA 1997 unless otherwise stated.

## **Class of entities**

3. The class of entities to which this Ruling applies, in relation to the CGT provisions, is the shareholders of Symbion Health Limited (Symbion) that:

- (a) are residents of Australia within the meaning of that expression in subsection 6(1) of the ITAA 1936;
- (b) are taken to have acquired their shares in Symbion on or after 20 September 1985;
- (c) participate in the scheme for Symbion shareholders under the planned scheme of arrangement;
- (d) are not 'significant stakeholders' or 'common stakeholders' within the meaning of the expressions in Subdivision 124-M; and
- (e) hold their shares on capital account, that is they do not hold their shares as revenue assets (as defined in section 977-50) or as trading stock.

4. The class of entities to which this Ruling applies, in relation to section 177E of the ITAA 1936, is all of the shareholders in Symbion.

5. The class of entities to which this Ruling applies, in relation to the imputation provisions, are the shareholders of Symbion who receive a final dividend on 28 September 2007 and are residents of Australia within the meaning of that expression in subsection 6(1) of the ITAA 1936.

## **Qualifications**

6. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

7. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 15 to 38 of this Ruling.

8. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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## Date of effect

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10. This Ruling applies from 1 July 2007 to 30 June 2008. However, the Ruling continues to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.

11. The Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

12. If this Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

13. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

14. If the two conditions in paragraph 13 of this Ruling, do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

## Scheme

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15. The following description of the scheme is based on information provided by the applicant, Symbion. The following documents or relevant parts of them form part of and are to be read with the description.

- Class Ruling application dated 8 June 2007 from Symbion requesting the Tax Office to make a Class Ruling in relation to the scrip for scrip roll-over provisions and the dividend stripping provisions as they apply to the acquisition of Symbion by Healthscope Limited (Healthscope);
- Symbion and Healthscope Joint Announcement dated 29 May 2007 entitled 'Healthscope and Symbion to create Australia's pre-eminent healthcare services provider';
- duly executed Scheme Implementation Deed (SID) and accompanying Annexures A-C inclusive dated 28 May 2007 between Symbion and Healthscope;
- amendment to Application for Class Ruling from KPMG dated 27 July 2007;
- correspondence from KPMG dated 10 July 2007 summarising the financing arrangements between Healthscope and the Ironbridge Capital and Archer Capital Consortium (IAC Consortium);
- Symbion Explanatory Memorandum as at 3 August 2007 provided by Symbion;
- correspondence from KPMG dated 18 July 2007 summarising payment of the Permitted Symbion Dividend; and
- correspondence from KPMG dated 8 August 2007 enclosing final marked-up versions of the Scheme of Arrangement and SID highlighting final changes and explaining the major changes.

**Note:** certain information received from Symbion and KPMG has been provided on a commercial in-confidence basis and will not be disclosed or released under the Freedom of Information legislation.

16. On 29 May 2007, Healthscope and Symbion jointly announced that they had reached an agreement under which Healthscope will acquire all of the shares in Symbion for a combination of cash and Healthscope shares with an implied value of between \$4.30 and \$4.50 per Symbion share inclusive of any Symbion 2007 final dividend. The implied value of the bid increased to between \$4.36 and \$4.56 as a result of Symbion accepting an increased proposal from Healthscope.

17. The acquisition of all of the shares in Symbion will be undertaken by a Scheme of Arrangement which is expected to be completed by late September 2007 (the Symbion scheme). A sale of the Pharmacy and Consumer businesses to the IAC Consortium is proposed to occur following Healthscope's acquisition of the Symbion shares.

18. Annexure A to the SID is the 'Scheme of Arrangement made under section 411 of the *Corporations Act 2001* (Commonwealth)' (Scheme Document). The terms of the Scheme Document are consistent with the terms of the SID.

19. Pursuant to the Scheme Document, Symbion will effect a transfer of all Symbion shares and, after the completion of the necessary documentation, register Healthscope or a subsidiary of Healthscope being Healthscope Investments Pty Ltd (Healthscope Investments) as the holder of all of the Symbion shares. Neither Healthscope nor any other company in the wholly-owned Healthscope group will own Symbion shares prior to the implementation of the Symbion scheme.

20. Healthscope or Healthscope Investments will pay the Scheme Consideration to Symbion shareholders for the transfer of their Symbion shares. The Scheme Consideration will consist of cash (cash consideration) and Healthscope shares (share consideration).

21. Under the Symbion scheme, certain non-resident shareholders (Ineligible Overseas Shareholders) will not be eligible to receive the share consideration due to domestic and foreign regulatory requirements. The shares that would otherwise be deliverable to the Ineligible Overseas Shareholders will be sold by a Nominee on the ASX on their behalf, with the sale proceeds being remitted to the relevant non-resident shareholders. It is estimated these non-resident shareholders currently hold **0.06%** of Symbion shares.

22. The volume weighted average price of Healthscope shares for the 10-day period ending 10 September 2007 (Healthscope VWAP) will be used to determine the number of Healthscope shares each Symbion shareholder will receive for disposing of their shares in Symbion to Healthscope.

#### **Declaration and payment of final dividend by Symbion**

23. The SID permits Symbion to declare and pay a fully franked 2007 final dividend of up to 7 cents per share (the final Symbion dividend). The applicant has advised that Symbion's Board of Directors declared a final dividend of 5 cents per share and that Symbion will pay the final dividend on 28 September 2007.

24. The payment of the final Symbion dividend is not conditional upon the approval of the Symbion scheme by shareholders or on the implementation of the Symbion scheme.

25. Symbion shareholders will receive the final Symbion dividend provided that such shareholders are registered as a shareholder of Symbion on the record date for the payment of the dividend.

26. The final Symbion dividend will be debited against profits and funded from existing cash reserves, or, if necessary, by drawing down on existing loan facilities. Symbion will not fund the final Symbion dividend through loans from Healthscope or the IAC Consortium and will not receive other financial assistance in the form of indemnities or guarantees from Healthscope or the IAC Consortium.

27. The applicant has advised that under clause 4.10(d) of the SID, all persons entitled to receive Symbion shares under the Symbion Performance Rights Plan (PRP) will be entitled to participate in the Symbion scheme and receive the Scheme Consideration for shares they receive under the PRP provided they, like all other shareholders, meet the requirements set out in the SID enabling participation in the Symbion scheme.

28. However, the applicant has also advised that notwithstanding the inclusion of clause 4.10(d) of the SID the final Symbion dividend will not be payable on shares that issue after the dividend record date. Accordingly, participants under the PRP will not be entitled to the final Symbion dividend if the shares they receive under the PRP are not issued to them prior to the record date for the final Symbion dividend.

29. In the event that participants under the PRP do not receive their Symbion shares by the record date for the final Symbion dividend, then pursuant to clause 4.10(e) of the SID, the Board of Symbion may resolve and agree to pay such participants an amount of cash equivalent to the amount of any final Symbion dividend that would have otherwise been payable in respect of the shares they received under the PRP. Any cash payment made under clause 4.10(e) will also be debited against profits and funded from existing cash reserves. As the final Symbion dividend of \$0.05 per Symbion share has been declared, the aggregate amount of that dividend and the aggregate amount of any payment pursuant to clause 4.10(e) of the SID shall reduce the total cash consideration available under the Symbion scheme.

## **Consideration for the disposal of Symbion Shares**

30. The total consideration that will be payable by Healthscope to Symbion shareholders if the Symbion scheme is implemented will be:

- approximately \$1,238 million cash (less the aggregate cash amount of the final Symbion dividend and the aggregate cash amount of any payment made pursuant to clause 4.10(e) of the SID); and
- between approximately 266 million and 302 million new Healthscope shares.

31. The total cash consideration is reduced by the aggregate cash amount of the final Symbion dividend and the aggregate cash amount of any payment made pursuant to clause 4.10(e) of the SID. As the final Symbion dividend was declared as \$0.05 per Symbion share, the cash component of the consideration which Symbion shareholders will receive will be approximately \$1,205 million. The final Symbion dividend will be paid separately to those shareholders who hold Symbion shares on the record date for the dividend. The actual number of new Healthscope shares which will be issued to Symbion shareholders will depend on the Healthscope VWAP.

32. The total share consideration (being the number of new Healthscope shares that will be received under Option One for each Symbion share) will vary with the Healthscope VWAP as set out below (the figures have been rounded):

- If the Healthscope VWAP is equal to or less than \$5.30, the share consideration will be equal to 0.4642 new Healthscope shares. If the Healthscope VWAP is less than \$5.30 the implied value of the share consideration will be less than \$2.46 and, together with the cash consideration, equates to less than \$4.36 per Symbion share (less the per share amount of the final Symbion dividend).
- If the Healthscope VWAP is greater than \$5.30 and less than \$5.60, the share consideration will be between 0.4633 and 0.4401 new Healthscope shares. The implied value of the share consideration will be equal to \$2.46 and, together with the cash consideration, equates to \$4.36 per Symbion share (less the per share amount of the final Symbion dividend).
- If the Healthscope VWAP is greater than or equal to \$5.60 but less than or equal to \$6.05, the share consideration will be equal to 0.4393 new Healthscope shares. The implied value of the share consideration will be between \$2.46 and \$2.66 and, together with the cash consideration, equates to between \$4.36 and \$4.56 per Symbion share (less the per share amount of the final Symbion dividend).
- If the Healthscope VWAP is greater than or equal to \$6.06 but less than \$6.51, the share consideration will be between 0.4389 and 0.4092 new Healthscope shares. The implied value of the share consideration will be equal to \$2.66 and, together with the cash consideration, equates to \$4.56 per Symbion share (less the per share amount of the final Symbion dividend).



- If the Healthscope VWAP is equal to or greater than \$6.51, the share consideration will be equal to 0.4089 new Healthscope shares. The implied value of the share consideration will be above \$2.66 and, together with the cash consideration, equates to above \$4.56 per Symbion share (less the per share amount of the final Symbion dividend).

33. The allocation of the consideration as between cash and Healthscope shares for a given Symbion shareholder is dependent on which of the three options the shareholder elects. The three options are outlined in paragraphs 34, 35 and 36 of this Ruling (the figures in the options include rounding).

### ***Option One – Cash and Share Option (Default Option)***

34. Symbion shareholders who elect Option One will receive for each Symbion share, on the implementation of the Symbion scheme:

- \$1.85464 cash (as the cash amount of the final Symbion dividend was declared as \$0.05 per Symbion share); and
- between 0.4089 and 0.4642 new Healthscope shares.

### ***Option Two – Maximum Cash Option***

35. Symbion shareholders who elect Option Two will receive for each Symbion share, on the implementation of the Symbion scheme:

- \$1.85464 cash (as the cash amount of the final Symbion dividend was declared as \$0.05 per Symbion share);
- additional cash in lieu of the new Healthscope shares which Symbion shareholders would have received under Option One, to the extent that cash is available from the total cash consideration; and
- new Healthscope shares to the extent that cash is not received in lieu of new Healthscope shares due to the limit on the total cash consideration.

### ***Option Three – Maximum Share Option***

36. Symbion shareholders who elect Option Three will receive for each Symbion share, on the implementation of the Symbion scheme:

- between 0.4089 and 0.4642 new Healthscope shares;
- additional new Healthscope shares in lieu of the cash which they would have received under Option One, to the extent that new Healthscope shares are available from the total share consideration; and

- cash to the extent that new Healthscope shares are not received in lieu of cash due to the application of the limit on the total share consideration.

**Other matters*****Sale of Pharmacy Services and Consumer Businesses***

37. After the completion of the Symbion scheme, Healthscope proposes to sell the Pharmacy Services and Consumer businesses to the IAC Consortium for cash consideration of approximately \$721m.

38. Healthscope will use the cash consideration received from the sale of the Pharmacy Services and Consumer businesses to assist in funding the acquisition of the Symbion shares.

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**Ruling****CGT event A1 will happen**

39. CGT event A1 will happen when a Symbion shareholder disposes of a Symbion share to Healthscope on the Implementation Date under the Symbion scheme (section 104-10).

40. A Symbion shareholder will make a capital gain from CGT event A1 happening if the capital proceeds received for the disposal of their Symbion share exceeds its cost base. The shareholder will make a capital loss if those capital proceeds are less than the share's reduced cost base (subsection 104-10(4)).

41. The capital proceeds received for each Symbion share are so much of the sum of the market value of the Healthscope shares received, and the amount of cash received under the Symbion scheme as is reasonably attributable to each Symbion share (subsections 116-20(1)).

**Choosing scrip for scrip roll-over**

42. A Symbion shareholder can choose scrip for scrip roll-over under Subdivision 124-M provided:

- (a) the shareholder made a capital gain from CGT event A1 happening to their Symbion share; and
- (b) any capital gain that may be made upon a future CGT event happening in relation to the Healthscope share they received under the scheme would not be disregarded (except because of a roll-over).

43. If a Symbion shareholder chooses scrip for scrip roll-over and the only capital proceeds the shareholder received was replacement shares, the capital gain is disregarded completely (subsection 124-785(1)). If the shareholder received cash (ineligible proceeds) as well as the replacement shares the capital gain is disregarded in part (subsection 124-790(1)).

## **Cost base of Healthscope shares**

44. If a Symbion shareholder chooses scrip for scrip roll-over, the first element of the cost base and reduced cost base of their Healthscope shares will be worked out by reasonably attributing to those shares part of the cost base of the Symbion share(s) that they disposed of under the Symbion scheme and for which roll-over was chosen (subsections 124-785(2) and (4)).

## **Acquisition date of the Healthscope shares**

45. The acquisition date of the Healthscope shares is the date that they were issued to each Symbion shareholder (that is, the Implementation Date) (section 109-10).

46. For Symbion shareholders who choose scrip for scrip roll-over, the acquisition date of their Healthscope shares for CGT discount purposes is the date they acquired the corresponding Symbion shares that were disposed of for the relevant Healthscope shares (item 2 of the table in subsection 115-30(1)).

## **Dividend stripping**

47. The Symbion scheme will not be regarded as a scheme by way of or in the nature of dividend stripping, or a scheme having substantially the effect of a scheme by way of or in the nature of a dividend stripping to which section 177E of the ITAA 1936 is applicable.

## **Franking of dividend**

48. Where Symbion franks an ordinary dividend in accordance with section 202-5, the ordinary dividend will be a franked distribution.

## **Qualified persons**

49. The payment of the ordinary dividend is not an integral part of the Symbion scheme and will not constitute a related payment for the purposes of Division 1A of former Part IIIA of the ITAA 1936 (former Division 1A). Accordingly, the relevant holding period that must be satisfied by Symbion shareholders in order to be qualified persons with respect to the final Symbion dividend is the primary qualification period pursuant to former paragraph 160APHO(1)(a) of the ITAA 1936.

**The anti-avoidance provisions**

50. The Commissioner will not make a determination under paragraph 177EA(5)(a) or (b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the final Symbion dividend received by Symbion shareholders.

51. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits received in relation to the final dividend received by Symbion shareholders.

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**Commissioner of Taxation**12 September 2007

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## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

### **CGT event A1 will happen**

52. CGT event A1 will happen when a Symbion shareholder disposes of a Symbion share to Healthscope on the Implementation Date under the Symbion scheme (section 104-10).

### ***Time of the event***

53. The time at which CGT event A1 happens determines the income year in which any capital gain or loss is made and whether the CGT discount applies to any capital gain.

54. Subsection 104-10(3) provides that the time CGT event A1 happens is when the person enters into a contract for the disposal of the shares, or if there is no contract, when the change of ownership occurs.

55. Under the Symbion scheme, the disposal does not happen under a contract (see paragraph 9 of the addendum to Taxation Determination TD 2002/4). Accordingly, Symbion shareholders will be taken to have disposed of their Symbion shares when the change of ownership occurs on the Implementation Date.

### ***Capital gain or capital loss***

56. A Symbion shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Symbion share exceeds its cost base. A Symbion shareholder will make a capital loss if those capital proceeds are less than the Symbion share's reduced cost base (subsection 104-10(4)).

57. Subsection 116-20(1) provides that the capital proceeds from a CGT event are the total of the money and the market value of any property received or entitled to be received (worked out at the time of the event) in respect of the event happening.

58. Accordingly, the total capital proceeds received by each shareholder under the Symbion scheme is the sum of the cash and the market value of Healthscope shares (worked out as at the time of the event) that is received (subsection 116-20(1)).

59. The Commissioner accepts that the closing price of the Healthscope shares on the Implementation Date represents an appropriate methodology for the determination of the market value of Healthscope shares received by Symbion shareholders under the scheme.

60. A Symbion shareholder who makes a capital gain will be eligible to treat the gain as a discount capital gain provided they held the Symbion share for at least 12 months before the disposal and the other requirements of Subdivision 115-A are satisfied (section 115-25).

### **Choosing scrip for scrip roll-over**

61. Scrip for scrip roll-over enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in exchange.

62. A capital gain is disregarded completely if the only capital proceeds the shareholder receives is one or more replacement share(s). If the shareholder receives some other form of capital proceeds, the capital gain is disregarded only to the extent of the shares received. The roll-over also provides that the first element of the cost base and reduced cost base of the replacement share is based on the cost base and reduced cost base of the original share at the time of the roll-over.

### **Requirements for scrip for scrip roll-over – Subdivision 124-M**

63. Subdivision 124-M contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over. The main conditions and exceptions that are relevant to the circumstances of the Symbion scheme are:

- (i) shares are exchanged for shares in another company;
- (ii) the exchange occurs as part of a single arrangement;
- (iii) conditions for roll-over are satisfied;
- (iv) further conditions are not applicable; and
- (v) exceptions to obtaining scrip for scrip roll-over are not applicable.

These conditions are explained below.

### ***Shares are exchanged for shares in another company***

64. Subparagraph 124-780(1)(a)(i) requires an entity (a Symbion shareholder) to exchange a share in a company for a share in another company.

65. This requirement is satisfied for those Symbion shareholders who receive shares in Healthscope in exchange for the disposal of their Symbion shares.

66. This requirement is not satisfied for those Symbion shareholders who receive only cash in exchange for the disposal of their Symbion shares.

### ***The exchange occurs as part of a single arrangement***

67. Paragraph 124-780(1)(b) requires that shares in an entity (Symbion, the original entity) be exchanged in consequence of a single arrangement. In the context of the scrip for scrip roll-over provisions, the Symbion scheme constitutes a single arrangement. The single arrangement must also satisfy the following conditions.

#### ***(a) 80% ownership***

68. Paragraph 124-780(2)(a) requires that shares in an entity (Symbion, the original entity) be exchanged as a consequence of a single arrangement that results in another entity (Healthscope, the acquiring entity) becoming the owner of 80% or more of the voting shares in the original entity (Symbion).

69. Subparagraph 124-780(2)(a)(ii) provides that this requirement will be satisfied if one or more companies that are members of a wholly-owned group increase the percentage of voting shares they hold in the original entity to 80% or more.

70. Under the Symbion scheme, the acquiring entity (Healthscope) will become the owner of more than 80% of the voting shares in Symbion. At the time of implementing the Symbion scheme, Healthscope Investments was a member of a wholly-owned group. The shares in Symbion satisfy the definition of 'voting share' in subsection 995-1(1).

71. Therefore, the requirements of subparagraph 124-780(2)(a)(ii) will be met under the Symbion scheme.

#### ***(b) All voting share owners participate***

72. Paragraph 124-780(2)(b) requires that the exchange of shares must be in consequence of a single arrangement in which at least all owners of voting shares in the original entity (apart from the acquiring entity or members of the acquiring entity's wholly-owned group) could participate.

73. This requirement is satisfied because all the owners of voting shares in Symbion will be entitled to participate in the Symbion scheme. Neither the acquiring entity (Healthscope) nor members of its wholly-owned group will own voting shares prior to implementation of the Symbion scheme.

*(c) Participation is on substantially the same terms*

74. Paragraph 124-780(2)(c) requires that the exchange is in consequence of an arrangement in which participation is available on substantially the same terms for all of the owners of interests of a particular type in the original entity (Symbion).

75. This requirement is satisfied because the Symbion scheme provided that all ordinary shareholders in Symbion are entitled to participate in the Symbion scheme on the same terms.

76. The issue of Healthscope shares to certain foreign Symbion shareholders in circumstances where a nominee will dispose of the Symbion shares on the ASX on their behalf with the sales proceeds being remitted to the relevant non-resident shareholders does not prevent the arrangement from being on substantially the same terms for all owners of shares in Symbion.

***Conditions for roll-over are satisfied***

77. Paragraph 124-780(1)(c) requires that the conditions for roll-over outlined in subsection 124-780(3) must be met. These conditions must be met in relation to each Symbion share for which scrip for scrip roll-over is chosen.

78. The conditions in subsection 124-780(3) are as follows.

*(a) The Symbion shares are post-CGT shares*

79. Paragraph 124-780(3)(a) requires the original interest holder (a Symbion shareholder) to have acquired its original interest (Symbion shares) on or after 20 September 1985 (that is, post-CGT).

80. Therefore, roll-over will only be available for those Symbion shares that are post-CGT shares.

*(b) A Symbion shareholder would otherwise make a capital gain*

81. Paragraph 124-780(3)(b) requires that, apart from the roll-over, the original interest holder (a Symbion shareholder) would make a capital gain from a CGT event happening in relation to its original interest (a Symbion share).

82. As explained at paragraph 40 of this Ruling, a capital gain will be made on a Symbion share if the capital proceeds from the disposal of that share are more than its cost base. Therefore, whether this condition was met will depend on the individual circumstances of each Symbion shareholder.



*(c) Symbion shareholders receive replacement interests in the acquiring entity or the ultimate holding company*

83. Paragraph 124-780(3)(c) requires that the replacement interest is in the acquiring entity (Healthscope), or the ultimate holding company of the wholly owned group which includes the acquiring entity.

84. This requirement is satisfied as the Symbion shareholders will receive shares in Healthscope which is the ultimate holding company of a wholly owned group that includes the acquiring entity (Healthscope).

*(d) A Symbion shareholder can choose scrip for scrip roll-over*

85. Paragraph 124-780(3)(d) requires that the original interest holder (a Symbion shareholder) chooses the roll-over, or if section 124-782 applies to it for the Symbion scheme, it and the replacement entity jointly choose to obtain the roll-over.

86. Section 124-782 has no application to the Symbion scheme since there will be no significant stakeholders or common stakeholders at the time of undertaking the Symbion scheme.

87. Subject to their eligibility (see paragraph 42 of this Ruling), whether a Symbion shareholder chooses to obtain roll-over in relation to the disposal of a Symbion share is a question of fact to be determined in respect of each individual shareholder.

### ***Further conditions are not applicable***

88. Subsection 124-780(4) provides that the additional requirements in subsection 124-780(5) must be satisfied if the original interest holder (Symbion shareholder) and the acquiring entity (Healthscope) did not deal with each other at arm's length and:

- (a) neither the original entity (Symbion) nor the replacement entity (Healthscope) had at least 300 members just before the arrangement started (paragraph 124-780(4)(a)); or
- (b) the original interest holder (Symbion shareholder), the original entity (Symbion), and the acquiring entity (Healthscope) were all members of the same linked group just before the arrangement started (paragraph 124-780(4)(b)).

89. Paragraph 124-780(4)(a) has no application in this case because Symbion had at least 300 members just before the arrangement started. Paragraph 124-780(4)(b) does not apply as Symbion, the Symbion shareholders and Healthscope will not be members of the same linked group just before the arrangement commences.

***Exceptions to obtaining scrip for scrip roll-over are not applicable***

90. Section 124-795 contains a number of exceptions where scrip for scrip roll-over cannot be chosen. The exceptions in subsection 124-795 are as follows.

***(a) Symbion shareholders are residents of Australia***

91. Subsection 124-795(1) provides that roll-over is not available if, just before the disposal, the original interest holder was a foreign resident, unless just after the acquisition of the replacement interest, the replacement interest is taxable Australian property.

92. The class of entities to whom this Ruling applies is limited to Symbion shareholders who will be residents of Australia at the time of the Symbion scheme. As a consequence, the exception in subsection 124-795(1) does not apply to limit this Ruling in this regard.

***(b) A capital gain cannot (apart from a roll-over) be otherwise disregarded***

93. Paragraph 124-795(2)(a) provides that the roll-over is not available if any capital gain you might make from your replacement interest would be disregarded (except because of a roll-over).

94. Whether a capital gain arising from a subsequent disposal of a Healthscope share (or other CGT event) is disregarded under another provision of the ITAA 1997 (for example, the shareholder will hold those Healthscope shares as trading stock) is a question of fact to be determined in respect of each Symbion shareholder.

95. Paragraph 124-795(2)(b) provides that roll-over is not available if the original interest holder and the acquiring entity are members of the same wholly-owned group just before the original interest holder stops owning their original interest, and the acquiring entity is a foreign resident.

96. This exception will not apply as the Symbion shareholders and Healthscope will not be members of the same wholly-owned group just before the Symbion scheme will be implemented. In addition, Healthscope is not a foreign resident company.

***(c) No roll-over available to the Symbion shareholders under either Division 122 or Subdivision 124-G***

97. Subsection 124-795(3) provides that scrip for scrip roll-over is not available if a roll-over can be chosen under Division 122 or Subdivision 124-G.

98. This exception does not apply as neither of the roll-overs in Division 122 or Subdivision 124-G are available to the Symbion shareholders in respect of the disposal of their Symbion shares under the Symbion scheme.

## **Consequences of choosing roll-over**

### ***Capital gain disregarded***

99. Scrip for scrip roll-over enables a shareholder to disregard all or part of a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in exchange.

100. If the only capital proceeds the shareholder receives in respect of the disposal are replacement shares, and the requisite conditions are satisfied, the capital gain is disregarded completely (subsection 124-785(1)).

101. If the capital proceeds the shareholder receives in respect of the disposal includes something (the ineligible proceeds) other than the replacement share, there is no roll-over for that part (the ineligible part) of its original interest for which it received ineligible proceeds (subsection 124-790(1)).

102. Under the Symbion scheme, Symbion shareholders will fall into three categories:

- (a) Participants in *Option 1* who will receive a combination of cash (ineligible proceeds) and Healthscope shares in exchange for their Symbion shares.
- (b) Participants in *Option 2* who will receive only cash in exchange for their Symbion shares unless the cash pool is depleted in which case they will receive a combination of cash and shares.
- (c) Participants in *Option 3* who will receive only Healthscope shares in exchange for their Symbion shares unless the share pool is depleted in which case they will receive a combination of shares and cash.

103. Under the Symbion scheme, where roll-over is chosen:

- (a) A capital gain made by a Symbion shareholder who receives only Healthscope shares is disregarded (subsection 124-785(1)).
- (b) A capital gain made by a Symbion shareholder who receives a combination of cash and Healthscope shares is disregarded to the extent that the capital gain is attributable to the receipt of the shares (subsection 124-790(1)).

104. Symbion shareholders who receive only cash in exchange for their Symbion shares cannot choose roll-over under the Symbion scheme. Accordingly, no part of any capital gain realised by such shareholders is disregarded.

***Proportion of capital gain that is disregarded where cash and Healthscope shares are received***

105. Holders of original interests (the Symbion shares) can obtain only a partial roll-over if their capital proceeds includes ineligible proceeds (subsection 124-790(1)).

106. The cost base that is used in working out the capital gain that is attributable to ineligible proceeds is that part of the cost base of the original interest that is reasonably attributable to the receipt of the ineligible proceeds (the ineligible part). This is calculated by multiplying the cost base of the original interest by the amount of the ineligible proceeds received in respect of each original interest and dividing the resultant number by the total capital proceeds attributable to the original interest (subsection 124-790(2)).

107. The capital gain from each replacement interest that is not disregarded is worked out by subtracting the cost base of the ineligible part of the original interest from that part of the ineligible proceeds that is reasonably attributable to each original interest.

**Cost base of Healthscope shares**

***If scrip for scrip roll-over is chosen***

108. Subsections 124-785(2) and (4) require that where scrip for scrip roll-over is chosen, the first element of the cost base and the reduced cost base of each share received as a result of an exchange is determined by reasonably attributing to it the cost base of the original interest for which it was exchanged.

109. Subsection 124-785(3) requires that where the holder of an original interest receives ineligible proceeds, the first element of the cost base and reduced cost base of each share received is reduced by so much of that cost base and reduced cost base as is attributable to an ineligible part.

110. Therefore, where scrip for scrip roll-over is chosen and only Healthscope shares are received, the first element of the cost base and the reduced cost base of the replacement Healthscope share will be determined by attributing a reasonable proportion of the cost base of the Symbion share(s) which were exchanged for each new interest.

111. However, where scrip for scrip roll-over is chosen and ineligible proceeds (cash) is received, the first element of the cost base and the reduced cost base of the replacement Healthscope share will be determined by attributing a reasonable proportion of the cost base of the Symbion share(s) reduced by the cost base of the ineligible part.

112. Symbion will advise its shareholders as to the basis of a reasonable cost base apportionment for both shareholders who receive only Healthscope shares and for those who receive both Healthscope shares and ineligible proceeds.

***If scrip for scrip roll-over is not, or cannot, be chosen***

113. Subsection 110-25(2) provides that the first element of the cost base of an asset is the total of:

- the money you paid or are required to pay in respect of acquiring it; and
- the market value of any other property given or required to be given in respect of acquiring it.

The market value of the property is worked out at the time of the acquisition.

114. For Symbion shareholders who do not, or cannot, choose roll-over (including those Symbion shareholders, if any, who receive ineligible proceeds), the first element of the cost base and reduced cost base of their Healthscope shares is determined by the market value of the Symbion shares they disposed of under the Symbion scheme.

**Time of acquisition of the Healthscope shares**

115. The time of acquisition of the Healthscope shares is when they are allotted to each Symbion shareholder. This occurs on the Implementation Date (section 109-10).

116. For Symbion shareholders who choose scrip for scrip roll-over, the time of acquisition of their Healthscope shares for CGT discount purposes is when they acquired their Symbion shares which were disposed of in exchange for the relevant Healthscope shares (item 2 of the table in subsection 115-30(1)).

**Dividend stripping**

117. Section 177E of the ITAA 1936 deals with situations where any property of a company is disposed of as a result of a scheme entered into after 27 May 1981, whether in Australia or outside Australia:

- by way of or in the nature of dividend stripping; or
- having substantially the effect of a scheme by way of or in the nature of a dividend stripping.

118. Having regard to the purpose of the Symbion scheme under which the shareholders dispose of their Symbion shares, the Symbion scheme will not be a scheme by way of or in the nature of dividend stripping, or a scheme having substantially the effect of a scheme by way of or in the nature of dividend stripping to which section 177E of the ITAA 1936 is applicable.

**Franking of dividend**

119. The dividend is a distribution made by Symbion to its shareholders and is debited against its retained earnings account. Therefore, the dividend constitutes a frankable distribution for the purposes of subsection 202-40(1), and is capable of being franked in accordance with section 202-5.

**Qualified persons**

120. Former Division 1A of the ITAA 1936 contains the measures referred to as the holding period rule and the related payment rule. In broad terms, former Division 1A of the ITAA 1936 provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' with respect to a franked distribution they have received and thus be entitled to a tax offset for the franking credit attached to the distribution (see sections 207-20 and 207-145 of the ITAA 1997). In particular, paragraph 207-145(1)(a) states that, if an entity to whom a franked distribution is made is '...not a qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 ...' they are not entitled to gross up their income for the franking credit received, nor claim a tax offset equal to the franking credit.

121. The test of what constitutes a 'qualified person' is provided in former section 160APHO of the ITAA 1936. Broadly speaking, to be a qualified person in relation to a dividend, a taxpayer must satisfy either the holding period rule or the related payment rule.

122. Former subsection 160APHO(1) of the ITAA 1936 states:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a 'qualified person' in relation to the dividend if:

- (a) where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or
- (b) where the taxpayer or an associate of a taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification in relation to the dividend.

123. If a taxpayer is not under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the primary qualification period. If a taxpayer is under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the secondary qualification period.

124. In order to determine which is the relevant qualification period, it is necessary to determine whether, under the proposed merger of Healthscope and Symbion, the current shareholders of Symbion are considered to be under an obligation to make a related payment. Former section 160APHN of the ITAA 1936 provides non-definitive examples of what constitutes the making of a related payment for the purposes of former Division 1A of the ITAA 1936. Former subsection 160APHN(2) of the ITAA 1936 provides as follows:

The taxpayer or associate is taken, for the purposes of this Division, to have made, to be under an obligation to make, or to be likely to make, a related payment in respect of the dividend or distribution if, under an arrangement, the taxpayer or associate has done, is under an obligation to do, or may reasonably be expected to do, as the case may be, anything having the effect of passing the benefit of the dividend or distribution to one or more other persons.

125. Former subsection 160APHN(3) of the ITAA 1936 states:

Without limiting subsection (2), the doing of any of the following by the taxpayer or an associate of the taxpayer in the circumstances mentioned in subsection (4) may have the effect of passing the benefit of the dividend or distribution to one or more other person:

- (a) causing a payment or payments to be made to, or in accordance with the directions of, the other person or other persons; or
- (b) causing an amount or amounts to be credited to, or applied for the benefit of, the other person or the other persons; or
- (c) causing services to be provided to, or in accordance with the directions of, the other person or other persons; or
- (d) causing property to be transferred to, or in accordance with directions of, the other person or other persons; or
- (e) allowing any property or money to be used by the other person or other persons or by someone nominated by the other person or other persons; or
- (f) causing an amount or amounts to be set off against, or to be otherwise applied in reduction of, a debt or debts owed by the other person or other persons; or
- (g) agreeing to treat an amount or amounts owed to the other person or other persons by the taxpayer or associate as having been increased.

126. Former subsection 160APHN(4) of the ITAA 1936 states:

The circumstances referred to in subsection (3), are where:

- (a) the amount or the sum of the amounts paid, credited or applied; or
- (b) the value or the sum of the values of the services provided, of the property transferred or of the use of the property or money; or
- (c) the amount or the sum of the amounts of the set-offs, reductions or increases;

as the case may be:

- (d) is, or may reasonably be expected to be, equal to; or
- (e) approximates or may reasonably be expected to approximate; or
- (f) is calculated by reference to; the amount of dividend or distribution.

127. In the current circumstances, the payment of any final Symbion dividend does not form an integral part of the Symbion scheme. The payment of any final Symbion dividend is not dependent in any way on the Symbion scheme being implemented. If paid, it will be paid out of Symbion's existing cash reserves or, if necessary, by drawing down on existing loan facilities and will only reduce the cash component of any consideration paid because the value of Symbion would then be worth less after payment of the final Symbion dividend. Furthermore, should the Symbion scheme be deferred, the record dates for the Symbion scheme and the final Symbion dividend will differ with the possibility that Symbion shareholders receiving the final Symbion dividend may not participate in the Symbion scheme.

128. As the Symbion scheme does not contemplate and require the final Symbion dividend to be declared and paid, the reduction in any cash consideration is not considered to constitute a notional crediting or passing on of the benefit of the ordinary dividend from a Symbion shareholder to Healthscope. As such, it is not considered to constitute a related payment for the purposes of former section 160APHN of the ITAA 1936.

129. As the Symbion shareholders are not taken, for the purposes of former Division 1A of the ITAA 1936, to be under an obligation to make a related payment in respect of the ordinary dividend, the relevant holding period is thus the primary qualification period pursuant to former paragraph 160APHO(1)(a) of the ITAA 1936.

## **The anti-avoidance provisions**

### ***Section 177EA***

130. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes to obtain a tax advantage in relation to imputation benefits. In essence, it applies to schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares. If section 177EA applies the Commissioner may make a determination under subsection 177EA(5) of the ITAA 1936 that either a franking debit arises to the company in respect of each dividend paid to the relevant taxpayer or, in the alternative, that no franking credit benefit arises in respect of a dividend paid to the relevant taxpayer.



131. Symbion is a corporate tax entity. The sale of the ordinary shares in Symbion pursuant to the Symbion scheme is a scheme for the disposition of membership interests. Therefore, it is considered that the conditions of paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided for in subsection 177EA(17) of the ITAA 1936), it would be concluded that, on the part of Symbion, its shareholders or any other relevant party, there is a purpose, more than merely an incidental purpose, of conferring a franking credit benefit under the scheme.

132. In arriving at a conclusion one must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17) of the ITAA 1936. The relevant circumstances listed there encompass a range of diverse matters which taken individually or in conjunction with other matters, listed or not, could indicate the requisite purpose, that is, that the delivery of the franking credit benefit is more than an incidental purpose of the scheme.

133. In this case the disposition of the ordinary shares in Symbion will be made pursuant to the Symbion scheme. The Symbion scheme is an ordinary commercial transaction. There is no intention evidenced in the Symbion scheme that the payment of the final Symbion dividend is to enable a particular shareholder or class of shareholders (current and future) to obtain imputation benefits.

134. Having regard to the relevant circumstances of the scheme, it cannot be concluded that Symbion or the shareholders entered into or carried out the scheme for the purpose of enabling the shareholders to obtain a franking credit benefit.

### **Section 204-30**

135. Section 204-30 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that:

- (a) an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a));
- (b) the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); and
- (c) the other member of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c)).

136. The terms 'stream' and 'streaming' are not defined in the ITAA 1997. However, the Explanatory Memorandum to the New Business Tax System (Imputation) Bill of 2002 explains the concept of streaming at paragraph 3.28 as 'selectively directing the flow of franked distributions to those members who can most benefit from imputation credits'.

137. Therefore, selectively directing the flow of franked distributions to those members that derive a greater benefit from franking credits (favoured members) to the exclusion of those members that are not (disadvantaged members) will constitute streaming. The result of such action by a company is the reduction or elimination of the intended wastage of franking credits, inherent in the design of the imputation system. However, a definite strategy designed to achieve this outcome would need to have been put in place by the company, before an arrangement could be classified as a streaming arrangement.

138. If section 204-30 applies, the Commissioner may make a determination pursuant to subsection 204-30(3) to debit the entity's franking account (paragraph 204-30(3)(a)), to debit the entity's exempting account (paragraph 204-30(3)(b)) or to deny imputation benefits that arise in respect of the distribution that is made to those members who derive a greater benefit (paragraph 204-30(3)(c)).

139. Subsection 204-30(8) provides a non-exhaustive list of circumstances where a member of an entity will be considered to have derived a greater benefit from franking credits than another member of the entity. Where a company makes a franked distribution to a single class of membership interest, with a consistent rate of franking, it would not be possible to uphold an assertion that streaming had occurred, as the allocation of franking credits across the entire membership was achieved on a consistent basis with no attempt to discriminate between the various members based upon their ability to utilise the associated franking credits.

140. Under the current proposal for the payment of a final Symbion dividend, all shareholders will receive an imputation benefit as a result of the final Symbion dividend; the resident shareholders in the form of a tax offset (paragraph 204-30(6)(a)) and the non-resident shareholders in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e)). The resident members will derive a greater benefit from franking credits than the non-resident members. However, as the entire final Symbion dividend is to be fully franked and paid to all shareholders, it cannot be argued that Symbion has directed the flow of distributions in such a manner as to ensure that imputation benefits are derived by members who derive greater benefit from franking credits, while other members receive lesser or no imputation benefits.

141. Accordingly, the Commissioner will not make a determination under section 204-30.

## Appendix 2 – Detailed contents list

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## References

### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TD 2002/4

### *Subject references:*

- arrangement
- capital proceeds
- CGT event
- company
- cost base
- dividend income
- dividend streaming arrangements
- frankable dividends
- franking credits
- imputation system
- interests
- mergers
- ordinary share
- original interest
- replacement interest
- resident
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- scrip for scrip rollover
- share
- shareholder deemed dividends

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- ITAA 1997 104-10(4)
- ITAA 1997 109-10
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Income Tax ~~ Tax integrity measures ~~ qualified persons - franking credits